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Harry C. Martin

THE STATE AS A "FONT OF INDIVIDUAL LIBERTIES": NORTH CAROLINA ACCEPTS THE CHALLENGE

HARRY C. MARTIN*

In his seminal *Harvard Law Review* article fifteen years ago,[1] as in these pages,[2] Justice Brennan admonished state courts to champion the protection of constitutional rights in the wake of the federal courts' full-scale retreat from that battleground.[3] Responding to this challenge, the Supreme Court of North Carolina on several occasions in the past decade has interpreted the North Carolina Constitution to provide the people of the state and others within its jurisdiction greater civil rights protections than the United States Constitution affords.[4] The North Carolina Supreme Court has made it clear that practitioners may, and should, look to the North Carolina Constitution as a rich and vibrant source of personal liberties.

In his oft-cited article, Justice Brennan emphasized that state constitutions are a new "font of individual liberties":[5]

> It is simply that the decisions of the [United States Supreme] Court are not, and should not be, dispositive of questions regarding rights guaranteed by counterpart provisions of state law. Accordingly, such decisions are not mechanically applicable to state law issues, and state court judges and the members of the bar seriously err if they so treat them. Rather, state

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* Associate Justice, Supreme Court of North Carolina (Ret.); Visiting Dan K. Moore Distinguished Professor of Law, University of North Carolina. A.B. 1942, University of North Carolina; LL.B. 1948, Harvard University; LL.M. 1982, University of Virginia. The author wishes to thank Professor Donna B. Slawson of Duke University for her assistance in the preparation of this Essay.

1. William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

2. William J. Brennan, Jr., *Foreword*, 70 N.C. L. REV. 1701, 1701 (1992).

3. Brennan, *supra* note 1, at 491.

4. *See* cases discussed *infra* notes 12-62 and accompanying text; *see also* State v. Johnson, 304 N.C. 680, 684, 285 S.E.2d 792, 795 (1982) (quantum of proof on voluntariness of confession; noting that a parallel United States Supreme Court decision "left the states free . . . to adopt a higher standard [than required by the United States Constitution] pursuant to their own laws"); State v. Felmet, 302 N.C. 173, 178, 273 S.E.2d 708, 712 (1981) (freedom of speech; noting that the North Carolina Supreme Court "could . . . interpret our State Constitution to protect conduct similar to that of defendant without infringing on any federally protected . . . right").

5. Brennan, *supra* note 1, at 491.

> court judges, and also practitioners, do well to scrutinize constitutional decisions by federal courts, for only if they are found to be logically persuasive and well-reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees, may they properly claim persuasive weight as guideposts when interpreting counterpart state guarantees. I suggest to the bar that, although in the past it might have been safe for counsel to raise only federal constitutional issues in state courts, plainly it would be most unwise these days not also to raise the state constitutional issues.[6]

The United States Supreme Court in the last twenty-five years has espoused the same notion: a state court, as a matter of its own constitutional law, may give greater protection to individual liberties than the national Supreme Court holds is mandated by the federal constitution.[7] Indeed, it is axiomatic in a union founded on the principle of federalism that states may elevate civil rights *above* the federal constitutional floor. Of course, when interpreting their constitutions and otherwise deciding cases, state courts must not *infringe* on the federally-protected rights of any party; for example, the state may not deprive a criminal defendant of his rights under the Bill of Rights and the Fourteenth Amendment, as the United States Supreme Court construes those rights.[8] State as well as federal judges have a federal constitutional obligation to uphold the United States Constitution as the supreme law of the land.[9] Federalism, however, requires sensitivity to the governmental interests of *both* the states and the United States, and "dictates that neither unduly interfere with the legitimate activities of the other."[10] Each state, therefore, may construe its own constitution differently from the United States Supreme Court's construction of analogous federal constitutional provisions as long as the rights the state affords its people are no less comprehensive

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6. *Id.* at 502.

7. *See, e.g.*, Oregon v. Hass, 420 U.S. 714, 719 (1985); Cooper v. California, 386 U.S. 58, 62 (1967).

8. *See, e.g.*, State v. Johnson, 304 N.C. 680, 683, 285 S.E.2d 792, 794 (1982).

9. *See, e.g.*, U.S. CONST. art. VI; State v. Davis, 253 N.C. 86, 95, 116 S.E.2d 365, 370-71 (1960) (holding that North Carolina courts have duty to protect civil rights under both the federal and state constitutions). Article six of the Constitution provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. CONST. art. VI.

10. State v. Long, 37 N.C. App. 662, 666, 246 S.E.2d 846, 850 (1978); *see* Younger v. Harris, 401 U.S. 37, 44 (1971).

than those guaranteed by the parallel federal provision.[11]

When faced with an opportunity to provide its people with increased protection through expansive construction of state constitutional liberties, a state court should seize the chance. By doing so, the court develops a body of state constitutional law for the benefit of its people that is independent of federal control. This unique *corpus juris* may be better adapted to the particular needs and concerns of the state, and stands safe from the vicissitudes of the United States Supreme Court.

During the past decade, North Carolina has been at the head of the movement to energize state constitutional law. In *State v. Carter*,[12] for example, the North Carolina Supreme Court concluded that the exclusionary rule, which bars the admission of evidence obtained in violation of the North Carolina Constitution's clause forbidding unreasonable searches and seizures,[13] is not subject to a good-faith exception.[14] The court reached this conclusion despite having held only two years earlier in *State v. Welch*[15] that a good-faith exception *does* exist to the exclusionary rule of the Fourth Amendment.[16] Why such strikingly different results in two cases that the supreme court decided in such close proximity and that address analogous constitutional questions? In *Welch* the court was bound by the United States Supreme Court's decision in *United States v. Leon*,[17] which had held explicitly that carved from the Fourth Amendment exclusionary rule is a good-faith exception.[18] In *Carter*, by contrast, the North Carolina Supreme Court construed the North Carolina Constitution. Rejecting the good-faith exception under that document, the *Carter* court served three purposes uniquely relevant to state constitutional adjudication: maintaining the fifty-year public policy of North Carolina supporting the exclusionary rule; protecting the integrity of the North Carolina judiciary; and continuing to develop North Carolina's body of state constitutional law. For a half-century the public pol-

11. Michigan v. Long, 463 U.S. 1032, 1032-33 (1983); State v. Carter, 322 N.C. 709, 713, 370 S.E.2d 553, 555 (1988); State v. Arrington, 311 N.C. 633, 642-43, 319 S.E.2d 245, 260 (1984).

12. 322 N.C. 709, 370 S.E.2d 553 (1988).

13. N.C. CONST. art. I, § 20.

14. *Carter*, 322 N.C. at 724, 370 S.E.2d at 562. A good-faith exception would allow the prosecution to introduce evidence obtained pursuant to an unlawful search or seizure if the law enforcement officer who committed the constitutional violation was acting pursuant to a good-faith belief that his conduct was constitutional. United States v. Leon, 468 U.S. 897, 913 (1984).

15. 316 N.C. 578, 342 S.E.2d 789 (1986).

16. *Id.* at 589, 342 S.E.2d at 795.

17. 468 U.S. 897 (1984).

18. *Id.* at 925.

icy of this state, evidenced by statute,[19] has required the suppression of evidence if it is unconstitutional under the North Carolina Constitution. Accordingly, it is not proper for the court to judicially craft a good-faith exception to this public policy. Moreover, placing its imprimatur on such an amendment to public policy would place the court in the untenable position of condoning unconstitutional acts. Finally, when the state court merely parrots the United States Supreme Court in decisions involving rights guaranteed by the state constitution, it forsakes its duty to develop a body of state constitutional law necessary to protect the rights of the people. Such failure would frustrate the very purpose of having a state constitution. The rights of the people of North Carolina are protected by *two* constitutions; common sense dictates that two bodies of law should implement those protections.[20]

The Constitution of North Carolina offers especially fertile ground for practitioners seeking to protect their clients' civil rights because the document itself provides certain protections that do not appear in its federal counterpart. The North Carolina Constitution, for example, "provides special protections against discrimination in jury selection . . . [that] are stronger than those contained in the federal constitution."[21] Article one, section twenty-six of the North Carolina Constitution provides that "[n]o person shall be excluded from jury service on account of sex, race, color, religion, or national origin."[22] In *Jackson v. Housing Authority*[23] the supreme court held that this section prohibits the exclusion of persons from jury service on account of their race in civil, as well as criminal, cases.[24] Significantly, only two other states at the time of the *Jackson* decision had interpreted their state constitutions to protect civil jurors from racial discrimination.[25] Moreover, although the United States Supreme Court had reaffirmed two years earlier that the Equal Protection Clause of the Fourteenth Amendment forbids racial discrimination in the selection of jurors at a criminal trial,[26] it was not until three

19. *See* N.C. GEN. STAT. § 15A-974 (1988).

20. *See generally* Ruth W. Grant, *The Exclusionary Rule and the Meaning of Separation of Powers*, 14 HARV. J.L. & PUB. POL'Y 173, 176-202 (1991) (discussing exclusionary rule from various perspectives).

21. Paul H. Schwartz, Comment, *Equal Protection in Jury Selection? The Implementation of* Batson v. Kentucky *in North Carolina*, 69 N.C. L. REV. 1533, 1575 (1991).

22. N.C. CONST. art I, § 26.

23. 321 N.C. 584, 364 S.E.2d 416 (1988).

24. *Id.* at 585, 364 S.E.2d at 416.

25. *See* Holley v. J & S Sweeping Co., 143 Cal. App. 3d 588, 592, 192 Cal. Rptr. 74, 77 (1983); City of Miami v. Cornett, 463 So. 2d 399, 401 (Fla. Dist. Ct. App.), *appeal dismissed*, 469 So. 2d 748 (Fla. 1985).

26. Batson v. Kentucky, 476 U.S. 79, 85 (1986).

years after *Jackson* that the Supreme Court extended that protection to civil cases.[27]

In *State v. Cofield*[28] the North Carolina Supreme Court held that purposefully excluding citizens from service as forepersons of the grand jury on the basis of race violates both the equal protection clause of the state constitution[29] and Article I, Section 26.[30] In addition to decrying the insidious practice of discrimination, *Cofield* stands as a powerful reminder that the Constitution of North Carolina is a beacon of civil rights, and that it is so because it represents the mandate of the people of North Carolina. As the *Cofield* court stated:

> [By adopting Article I, Section 26,] [t]he people of North Carolina have declared that they will not tolerate the corruption of their juries by racism, sexism and similar forms of irrational prejudice. They have recognized that the judicial system of a democratic society must operate evenhandedly if it is to command the respect and support of those subject to its jurisdiction.[31]

The North Carolina Supreme Court also has inferred from the state constitution protections for civil liberties that are not set forth explicitly in the charter's text. For example, unlike the United States Constitution,[32] the North Carolina Constitution does not mention specifically any guarantee of the common-law doctrine against double jeopardy. Nevertheless, the supreme court has interpreted the law-of-the-land clause of the state constitution[33] as containing that guarantee.[34] Early on, the court simply recognized the "sacred principle" of former jeopardy as a part of the common law.[35] Later, however, the court found the common-

27. *See* Edmonson v. Leesville Concrete Co., 111 S. Ct. 2077, 2088 (1991).

28. 320 N.C. 297, 357 S.E.2d 622 (1987).

29. N.C. CONST. art I, § 19 ("No person shall be denied the equal protection of the laws . . . .").

30. *Cofield*, 320 N.C. at 301, 357 S.E.2d at 624-25.

31. *Id.* at 302, 357 S.E.2d at 625. For an in-depth discussion of *Cofield*, see Jane R. Hart, Note, State v. Cofield, *Grand Expansion of Citizen Rights in Grand Jury Selection—The North Carolina Constitution Bars Discrimination in Foreperson Selection*, 68 N.C. L. REV. 1046 (1990).

32. *See* U.S. CONST. amend. V ("[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb . . . .").

33. N.C. CONST. art I, § 19. The law-of-the-land clause, which in many ways is analogous to the Due Process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, provides that "[n]o person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." *Id.*

34. State v. Brunson, 327 N.C. 244, 247, 393 S.E.2d 860, 863 (1990).

35. *See* State v. Prince, 63 N.C. 529, 531 (1869).

law practice to be an integral element of the law-of-the-land clause.[36]

At times, justices on the North Carolina Supreme Court promote state constitutional principles through concurring opinions. In *State v. Torres*,[37] for example, a unanimous court reversed a criminal conviction because the defendant's confession improperly had been admitted into evidence at trial.[38] In arriving at this conclusion, however, the court's members took two different routes—one federal, one state. The majority in *Torres* found that the confession had been obtained in violation of *Miranda v. Arizona*[39] and *Edwards v. Arizona*;[40] those cases, of course, announced judicially-crafted prophylactic rules designed to protect in a practical way the Fifth Amendment privilege against self-incrimination.[41] The concurring opinion in *Torres*, by contrast, was "based solely upon adequate and independent state constitutional grounds."[42] Rather than focusing on the Fifth Amendment and the United States Supreme Court cases decided under it, the concurrence looked to Article I, Section 23 of the North Carolina Constitution as the source of the defendant's rights.[43] That section provides: "In all criminal prosecutions, every person charged with crime has the right to . . . not be compelled to give self-incriminating evidence . . . ."[44] The concurring opinion maintained that the prophylactic rules of *Miranda* and *Edwards* should be adopted as part of the constitutional landscape of Article I, Section 23;[45] thus, like the majority, the concurrence concluded that the conviction must be reversed.[46] By grounding its argument in the state constitution, however, the concurring opinion laid a state constitutional foundation for the future should the United States Supreme Court retreat from the doctrine announced in *Miranda* and *Edwards*:[47] North Carolina practioners can

36. State v. Mansfield, 207 N.C. 233, 236, 176 S.E. 761, 762 (1934). It should be noted, however, that not all common-law doctrines are enshrined in the law-of-the-land clause. *See, e.g.*, Corum v. University of North Carolina, 330 N.C. 761, 785-86, 413 S.E.2d 276, 291 (1992) (holding that sovereign immunity is not a constitutional doctrine).

37. 330 N.C. 517, 412 S.E.2d 20 (1992).

38. *Id.* at 520, 412 S.E.2d at 21.

39. 384 U.S. 436 (1966).

40. 451 U.S. 477 (1981).

41. *Id.* at 484; *Miranda*, 384 U.S. at 466-73.

42. *Torres*, 330 N.C. at 531, 412 S.E.2d at 28 (Martin, J., concurring) (citing Michigan v. Long, 463 U.S. 1032, 1040 (1983); Jackson v. Housing Auth., 321 N.C. 584, 585, 364 S.E.2d 416, 417 (1988)).

43. *Id.* (Martin, J., concurring).

44. N.C. CONST. art I, § 23.

45. *Torres*, 330 N.C. at 532-33, 412 S.E.2d at 29-30 (Martin, J., concurring).

46. *Id.* at 531, 412 S.E.2d at 31 (Martin, J., concurring).

47. *Cf.* Oregon v. Elstad, 470 U.S. 298, 318 (1985) (holding admissible a confession obtained upon defendant's waiver of *Miranda* rights after police exacted from defendant an initial

argue that the protections of the state self-incrimination clause go beyond those of the Fifth Amendment.

Similarly, in *Medley v. Department of Correction*,[48] although the court was unanimous in its judgment, a concurring opinion flagged for future jurists and practitioners the possibility that the North Carolina Constitution provides greater protections than the United States Constitution.[49] The issue in *Medley* was whether the state's responsibility to provide prisoners with adequate medical treatment is a nondelegable duty for purposes of the North Carolina Tort Claims Act.[50] In partial support of its conclusion that the state may *not* delegate to other individuals the obligation to provide prisoners with proper medical care, the *Medley* majority noted that the duty to provide such care derives from the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Federal Constitution, as well as the analogous provision of the North Carolina Constitution.[51] Expounding on this discussion, the concurring opinion in *Medley* stressed a crucial distinction between the North Carolina and federal prohibitions against improper punishments:

> While the federal Constitution prohibits "cruel *and* unusual punishments," our State Constitution prohibits "cruel *or* unusual punishments." The conjunction in the federal Constitution has been interpreted to limit the Eighth Amendment's prohibition to punishments that are *both* cruel and unusual. The disjunctive term "or" in the State Constitution expresses a prohibition on punishments more inclusive than the Eighth Amendment. It therefore follows that if the Cruel and Unusual Punishment clause of the federal Constitution requires states to provide adequate medical care for state inmates, the Cruel or Unusual Punishment clause of the North Carolina Constitution imposes at least this same duty, if not a greater duty.[52]

Although this distinction did not affect the outcome in *Medley*, it may prove significant if the United States Supreme Court holds a practice not to constitute cruel *and* unusual punishment under the Eighth Amendment. As the *Medley* concurrence tells us, such a practice still could

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confession without obtaining waiver of those rights); New York v. Quarles, 467 U.S. 649, 655-56 (1984) (finding exception to *Miranda*).

48. 330 N.C. 837, 412 S.E.2d 654 (1992).

49. *Id.* at 845, 412 S.E.2d at 660 (Martin, J., concurring).

50. *Id.* at 839, 412 S.E.2d at 656.

51. *Id.* at 842-43, 412 S.E.2d at 657-58 (citing U.S. CONST. amend. VIII; N.C. CONST. art. I, § 27; West v. Atkins, 487 U.S. 42, 56 (1988); and Estelle v. Gamble, 429 U.S. 97, 106 (1976)).

52. *Id.* at 845-46, 412 S.E.2d at 660 (Martin, J., concurring) (citation omitted).

amount to cruel *or* unusual punishment under the North Carolina Constitution.

Concurring opinions like those in *Torres* and *Medley* promote North Carolina's state constitutional tradition in several ways. First, they alert both the bar and the public that state constitutional issues can, and should, be raised and addressed in similar cases in the future. Moreover, concurring opinions offer the justices further opportunities to expose hidden or dormant state constitutional arguments—they are additional judicial canvas, as it were, for North Carolina's ever-expanding constitutional mural. In his concurring opinion in *State v. Cofield*, for example, Justice Mitchell expounded on the majority's discussion with what may be the definitive statement of the meaning of Article I, Section 26: "[I]t is clear beyond any doubt that this section of our Constitution was intended as an absolute guarantee that all citizens of this State would participate fully in the honor and obligation of jury service in all its forms . . . ."[53]

Despite the importance of concurring opinions to the state's constitutional *corpus juris*, however, cases like *Carter*, *Brunson*, and others prove that state constitutional issues in North Carolina are not merely being relegated to concurring opinions. More and more, state constitutional principles carry the day with a majority of the North Carolina Supreme Court. A recent example of this growing tendency is *Corum v. University of North Carolina*.[54] In *Corum* the plaintiff sued the University of North Carolina, Appalachian State University, and state officials, alleging he was fired as a dean at Appalachian State for having exercised the rights of free speech guaranteed to him by the First Amendment to the federal constitution[55] and by Article I, Section 14[56] of the North Carolina Constitution.[57] Among the many issues the court addressed was whether state law provided the plaintiff with a damages remedy for this type of constitutional violation.[58] The court concluded that the plaintiff could sue the state officers (in their official capacities) for wrongful termi-

53. State v. Cofield, 320 N.C. 297, 310, 357 S.E.2d 622, 630 (1987) (Mitchell, J., concurring in the result).

54. 330 N.C. 761, 413 S.E.2d 276 (1992). For a discussion of *Corum*, see John D. Boutwell, Note, *The Cause of Action for Damages Under North Carolina's Constitution:* Corum v. University of North Carolina, 70 N.C. L. Rev. 1899 (1992).

55. *See* U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech . . . .").

56. N.C. CONST. art. I, § 14 ("Freedom of speech and of the press are two of the great bulwarks of liberty and therefore shall never be restrained, but every person shall be held responsible for their abuse.").

57. *Corum*, 330 N.C. at 766, 413 S.E.2d at 280.

58. *Id.* at 781, 413 S.E.2d at 289.

nation.[59] In an opinion tracing the history of North Carolina's protections of civil liberties, the court held that "in the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution."[60] Noting that the judiciary's "obligation to protect the fundamental rights of individuals is as old as the State,"[61] the court declared that "[a] direct action against the State for its violations of free speech is essential to the preservation of free speech."[62] The North Carolina Supreme Court's willingness to infer a remedy directly from the state constitution stands in sharp contrast to the recent constitutional jurisprudence of the United States Supreme Court, which has curtailed dramatically the availability of damage actions directly under the Federal Constitution.[63] This simultaneous rise and fall of implied state and federal constitutional remedies respectively is but one example of the current waxing of state and waning of federal constitutional protections.

More than two centuries after the people of North Carolina made a solemn commitment to preserve civil liberties by adopting the Declaration of Rights, the challenge to protect those liberties remains. The North Carolina Constitution is the people's timeless shield against encroachment on their civil rights. During the past decade, North Carolina practitioners and the North Carolina Supreme Court have shaken the cobwebs from the state's fundamental charter, making it clear that the state constitution is a living, breathing document. The cases discussed in this Essay, the symposium of which this Essay is a part, and the emphasis state constitutional law has received at the University of North Carolina School of Law[64] are but three examples of the resurgence of state constitutional law in North Carolina. As students of state constitutional law move into the mainstream of the legal profession, they bring life to North Carolina's constitutional tradition. By continuing to present state constitutional issues to the courts of North Carolina, the bar can contribute to the continuing development of a body of state constitutional jurisprudence for the benefit of all the people of North Carolina.

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59. *Id.* at 782, 413 S.E.2d at 289.

60. *Id.*

61. *Id.* at 783, 413 S.E.2d at 290.

62. *Id.* at 782, 413 S.E.2d at 289.

63. The United States Supreme Court originally recognized an action for damages directly under the Constitution in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971). Recently, however, the Court has limited sharply the availability of *Bivens* actions. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 461-63 (1989).

64. The School of Law has offered a seminar in state constitutional law since 1984.